Dec 8. 1-267 Judge Davis.

Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 496.

SAMUEL BLACK, RICHARD KITCHEN, AND WILLIAM A. MARTIN, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 25, 1875.

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1 *Petition.*

U. S. Court of Claims, December term, 1871.

SAMUEL BLACK, RICHARD KITCHEN, & WM. A. MARTIN. *vs.* THE UNITED STATES. } No. 6425. Filed March 22d, 1872. J. R.

The petition of Samuel Black, Richard Kitchen, and William A. Martin, citizens of the United States, respectfully represents:

That in the month of March, 1868, they entered into a written contract with Genl. William Myers, a quartermaster, acting for and in behalf of the United States, for the transportation of Government military stores and supplies on route No. 1 west of the Missouri River. A copy of this contract and the tabular statement referred to in it is hereto annexed, and marked "Exhibit A," and petitioners pray it may be read and considered as part of this petition.

Petitioners further show, that by the terms of the said contract Fort D. A. Russell was a starting-point from which they were bound to send teams for transportation of supplies on the said route, and that on or about the 30th day of April, 1868, they were required to have in readiness at, and to start from, said Fort D. A. Russell, upon the said route, transportation-teams of a carrying capacity of 900,000 pounds; that in pursuance of said requirement they sent from Leavenworth, Kansas, and other points on or near the Missouri River, to Fort D. A. Russell, about one hundred teams, and collected from other points fifty-three other terms at Ft. D. A. Russell, and prepared themselves fully in every respect to carry with the said teams 900,000 pounds of military stores and supplies from the said Ft. D. A. Russell upon the said route, upon the terms and according to the requirements of the said contract. And petitioners show that the officers authorized to act for the United States refused to turn over military stores and supplies to the claimants for transportation upon the said teams from Fort D. A. Russell, and ordered and required your petitioners to send, without loading, the said teams from Fort D. A. Russell to Fort Phil Kearney, and that petitioners thereupon notified Gen. William Myers, Gen. W. T. Sherman, and Gen. C. C. Augur, officers acting on behalf of the United States, that they would execute the said order, and that they would demand payment for
2 the service required; and they show that in the execution of the said order they sent, on the 25th of May, 1868, one hundred and fifty-three teams, of a carrying capacity of 900,000 pounds, from Fort D. A. Russell; that the said teams arrived at Fort Phil Kearney on the 19th day of June, 1868; that in the performance of the said journey they necessarily travelled a distance of 339 miles, and were employed in the same 25 days.

Petitioners further show that they have received no compensation for the said service; that they are entitled to be paid at the rate specified by their contract for the distance travelled according to the carrying capacity of said teams, viz, the sum of $48,780; and petitioners show that the said service was fairly and reasonably worth the said sum.

Petitioners further show that on the 23d day of July, 1868, they were required by Gen. William Myers, a quartermaster, acting on behalf of the United States, to send forty-two teams, of a carrying capacity of 250,000 pounds, from Fort Fetterman to Fort Phil Kearney, a distance of one hundred and sixty-nine miles, and that they obeyed the said

requisition and performed the said service, and that the fair and reasonable value of said service was $6,750, and that payment for the same is still due from the United States Government.

Petitioners further show that when they entered into the said contract they associated with themselves Alexander Caldwell and Leonard T. Smith, of Leavenworth, Kansas, and that they were associated with the petitioners in the performance of the service herein set forth, and in the event of a recovery of judgment they will be required to account to their said associates for their respective interests.

Petitioners further show that they, and each of them, and each of their said associates, have at all times borne true allegiance to the Government of the United States, and that neither of them have in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and they pray judgment of this honorable court for the sum of $55,530, and for such other and further relief as the nature of the case may seem to require.

HARVEY SPALDING,
Attorney for Claimant.

Harvey Spalding, being duly sworn, deposeth that he is the attorney for the claimants in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or any interest therein has been made except as in said petition is stated; that the claimants are justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsetts; and that he believes the facts as stated in said petition are true.

HARVEY SPALDING.

3 Sworn to and subscribed before me this 22d day of March, 1872.

[SEAL.] EDM. F. BROWN,
Notary Public.

Claimants' address, Leavenworth, Kansas,
Address of claimants' solicitor, C. F. Peck, Washington, D. C.

Contract for route No. 1, for 1868-'9.

This agreement, made and entered into this 19th day of March, 1868, by and between Brevet Brig. Gen'l William Myers, A. Q. M., U. S. Army, chief Q. M. Department of the Platte, for and on behalf of the U. S., of the first part, and Samuel Black, Richard Kitchen, and Wm. A. Martin, all of the city and county of Leavenworth, State of Kansas, composing the firm of Black, Kitchen & Martin, of the second part, for themselves, their heirs, executors, and administrators, witnesseth that the said parties have covenanted and agreed, and by these presents, do covenant and agree, to and with each other, as follows, viz:

ARTICLE I. That the said Black, Kitchen & Martin shall receive at any time, in any of the months from April 1st, 1868, to March 31st, 1869, inclusive, from the officers or agents of the Q. M. Department at Fort D. A. Russell, in the Territory of Dakota, or such point as may be determined upon during the year on the Omaha Branch of the Union P. R. R., west of Fort D. A. Russell, or at Fort Laramie, Dakota Territory, all such military stores and supplies as may be offered or turned over to them for transportation, in good order and condition, by the officer or agent of the Q. M. Department, at any or all of the above points or

places, and transport the same with dispatch, and deliver them, in like good order and condition, to the officer or agent of the Q. M. Department on duty or designated to receive them at any of the posts or depots that are now or may be established in the State of Nebraska west of longitude 102 degrees, in the Territory of Montana south of latitude 47 degrees, in the Territory of Dakota west of longitude 104 degrees, in the Territory of Idaho east of longitude 114 degrees, and in the Territories of Utah and Colorado north of latitude 40 degrees, including, if necessary Denver City, or at any other points or posts on the route, agreeably to the instructions they may receive from the officer or other authorized agent of the Q. M. Dept., charged with the duty of forwarding the stores and supplies at Fort D. A. Russell, or other place of departure; and for the faithful performance of such service they shall be paid in the manner hereinafter provided for in Article XVII of this agreement, and at the rates specified and shown in the tabular statement hereto annexed and signed by the parties to this agreement, which statement is considered as part hereof.

ART. II. That the said Black, Kitchen & Martin agree and bind themselves, their heirs, executors, and administrators, to transport
4 under this agreement, from the post, depots, or stations named in Article I, or from and to any other post, depots, or stations that may be established within the district described in said article, any number of pounds of military stores and supplies from and between one hundred thousand pounds and twenty-five millions of pounds in the aggregate.

ART. III. The said Black, Kitchen & Martin agree and bind themselves to have at Omaha City, Nebraska, and also at Cheyenne, Dakota Territory, a place of business or agency, and for all stores to be forwarded from Fort D. A. Russell, or from any other points of departure on the Union Pacific R. R., notice shall be given the said Black, Kitchen & Martin at said place of business or agency at Omaha City or Cheyenne.

ART. IV. In order that the said Black, Kitchen & Martin shall be in readiness to meet the demands and requirements made upon them for transportation under this contract and agreement, due notice shall be given them or their agent, of the quantity and kind of stores to be transported at any one time; at what point the stores will be ready for delivery to them, and the place of their destination, subject to such changes as may be decided upon while in transitu, as herein provided for, that is to say, for any quantity less than three hundred thousand pounds, fifteen days' notice; for any quantity between three hundred thousand pounds and six hundred thousand pounds, twenty days' notice; for any quantity between six hundred thousand pounds and one million lbs., thirty days' notice; for any quantity between one million lbs. and two million five hundred thousand pounds, forty days' notice; for any quantity between two millions five hundred thousand pounds and five millions of pounds, fifty days' notice; for any quantity between five millions of pounds and ten millions of pounds, sixty days' notice; for any quantity between ten millions and twenty millions of pounds, seventy days' notice; for any quantity between twenty millions and twenty-five millions of pounds, eighty days' notice.

ART. V. The military stores and supplies which shall be transported under this agreement shall be consigned to their respective destinations, and receipts on bill of lading shall be given by the officer of the Q. M. Dept. serving at the place of consignment, for the full quantity of stores that shall be delivered, and upon such receipts payment shall be made to the said Black, Kitchen & Martin as hereinafter provided.

ART. VI. That all the means of transportation to be used by the said Black, Kitchen & Martin under this agreement shall be submitted to the inspection of the officer or agent of the Q. M. Dept., at the place of departure, and such only shall be used as may be then and there accepted by him. The stores turned over to the said Black, Kitchen & Martin for transportation shall be transported in trains of not less than twenty-five wagons each, whenever the officer or agent of the Q. M. Dept., at the point of starting, shall turn over a sufficient quantity of stores to make up the loading of that number of wagons; and in all cases
5 the stores turned over for transportation shall be delivered to the consignee by the contractors in the same lots or invoices as received at points of departure.

ART. VII. That to insure the delivery of the stores and to aid the contractors in the execution of their agreement, certificates setting forth the number of the train, the number of wagons in it, and the condition of the train for the prosecution of its journey, shall be given by the officers of the Q. M. Dept., at Forts Laramie and Bridger, and such other points as are hereafter designated. Upon each certificate so given, setting forth the good condition of the train, payment shall be made to the contractors for the service rendered to that point; and upon the arrival of the train at its place of destination or delivery, the officer or agent of the Q. M. Dept. at the point of delivery, shall endorse the bill of lading in accordance with the finding of a board of survey, as hereinafter provided, stating the quantity and condition of the stores delivered, upon which endorsement payment shall be made, as per contract, deducting the amount of any payment or payments previously made; and also, for any articles missing, lost, destroyed, or damaged, and which the board of survey may find to be properly chargeable to the contractors, at the rate specified in article 8 of this agreement.

ART. VIII. In all cases where stores have been transported by the said Black, Kitchen & Martin, under this agreement, a board of survey, to be applied for in writing, by the contractors or their agent, (one member of which board shall be, when practicable, an officer on duty in the Subsistence Department,) shall be called without delay, on their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported, and in cases of loss, deficiency, or damage, and state whether it was attributable to the contractors in neglect or want of proper care on their part, or to causes beyond their control; and these proceedings, a copy of which shall be furnished to the contractors, shall be attached to the bill of lading, and shall govern the payment to be made on it. For loss of weight due to shrinkage and for leakage of vinegar, molasses, or other liquids, the contractors shall not be held liable, if the packages are delivered in good order and condition, and the board of survey shall be satisfied that such shrinkage or leakage did not arise from neglect or want of care on the part of contractors, or their agent. For loss, deficiency, or damage attributable to the contractors, they shall pay double the cost, at the point where they receive the articles, which cost shall be determined by taking the cost price at place of purchase and adding thereto the cost of transportation to the point where the stores were turned over to the contractors, and no freight whatever shall be paid on stores deficient. In case of damage, freight shall be deducted in proportion to the quantity damaged. Should no board of survey be called when requested by contractors through failure on the part of the Q. M. Dept., or other military authority to convene one, it shall be considered that the contractors have de-
6 livered all the stores as specified in the bill of lading, in good or-

der and condition, and they shall be paid accordingly. But before such payment is made, the fact must be shown that the contractors or their agent did make application in writing to the Q. M. for a board of survey. If the amount of loss, deficiency, or damage exceeds the value of the bill of lading, it shall be deducted from any after-payments that may become due. Transportation to be paid in all cases according to the distance from the place of departure to that of delivery, the distance to be ascertained and fixed by the chief Q. M. of the Dept. of the Platte, and in no case to exceed the distance by the usual and customary route. Where, however, stores are taken from trains before reaching their destination by competent military authority, the contractors will be allowed an increase of pay of five per cent. on contract rates to point of actual delivery; provided, that in no case more than the regular rates for the whole distance are paid.

ART. IX. That in case any one or more of the trains of the said Black, Kitchen & Martin are stopped or delayed at any time or place exceeding two days, either by the orders of an officer or agent of the Q. M. Dept., or the commanding officer of a post, or of troops present, or by failure of the proper officer to convene a board of survey when requested by contractors in writing, the contractors shall be paid upon a statement in writing, procured from the officer or agent of the Government causing the delay, the sum of five dollars per diem for each and every team in the train, for each and every day they may be delayed. But no such payment shall be made when the order for the stoppage of a train or any portion thereof is given, because of the inability of the contractors to proceed with the said train, or any portion thereof, by reason of deficiency in quantity or quality of means of transportation, or by any act or fault of theirs. In case the officer or agent of the Government aforesaid shall refuse to furnish the statement in writing above referred to, then the delay shall be paid for as above, on the affidavits or other satisfactory evidence of credible and competent witnesses. All orders from officers or agents of the Government to halt trains, shall be given to the contractors or their agent in writing, expressing fully the reason thereof; provided, that when such delay is occasioned by proper military authority for the protection of the trains, the delay shall not entitle the contractors to any compensation, but the time so lost shall be allowed them in computing the time of the trip.

ART. X. The said Black, Kitchen & Martin shall be furnished on application to post commander with a suitable escort for the protection of the supplies, should they be required to transport in any one train a less quantity than one hundred and twenty-five thousand pounds.

ART. XI. That the said Black, Kitchen & Martin shall transport all the military stores and supplies for which the Q. M. Dept. may require wagon-transportation by contract, on the route specified by this
7 agreement, during the year ending March 31st, 1869, provided the weight of such military stores and supplies shall not exceed in the aggregate twenty-five millions of pounds: yet nothing herein shall be so construed as to forbid or prevent the United States from using its own means of transporting for such service whenever it may be deemed advisable to do so.

ART. XII. That all stores shall be delivered in a reasonable time after being turned over to the contractors, not to exceed ten days per hundred miles for mule-trains and fourteen days per hundred miles for ox-trains, from the time of starting, unless detained by order en route, which must be produced. And in determining the date of starting, the date of bill of lading shall govern, and the bill of lading shall bear

date on the completion of the loading of the train, and the contractors shall be allowed for loading, not to exceed two days for each train of twenty-five wagons, and in that proportion for any greater or less number of wagons, from the time the stores are turned over to the contractors for transportation, as provided for in article 1 and 4 of this agreement. Any delay beyond such time as specified to be charged to the contractors at the rate allowed for delay caused by orders, as provided in article 9 of this agreement, unless such delay arises from causes beyond the control of the contractors and so determined by a board of survey.

ART. XIII. That in case of failure by reason of deficiency in the quality or quantity of the means of transportation furnished, or from any other cause, on the part of the said Black, Kitchen & Martin, to be in readiness to meet the demands and requirements made upon them for transportation under this contract or agreement, after due notice shall have been given them or their agents, as provided for in article 4 of this agreement, then the officer or authorized agent of the Q. M. Dept. charged with the duty of forwarding the stores and supplies shall have power to supply the deficiency either by purchase, hire, or special contract, as the said officer or agent may elect, and the said Black, Kitchen & Martin will be charged with the difference of the cost or expense thus incurred.

ART. XIV. It is understood that if at any time stores or supplies are required to be transported back to any point on the road, or to any of the original points of departure, or from one point to another within the route, they shall be carried upon the same terms and conditions as herein provided.

ART. XV. It is understood that the Government will, whenever it is deemed advisable, contract for forage to be delivered at any of the posts within the territory described in article 1.

ART. XVI. It is distinctly understood that should any of the supplies while in the hands of the contractors be transported by rail over any portion of the route, the Government will pay the rates the contractors pay for said transportation and nothing more.

ART. XVII. For and in consideration of the faithful performance of the stipulations of this agreement, the said Black, Kitchen & Martin shall be paid at the office of the Quartermaster's Department at
8 Omaha, Nebraska, in the legal currency of the U. S., according to the distance supplies are transported, and agreeably to the rates specified in the tabular statement hereto annexed, signed by the parties to this agreement.

ART. XVIII. It is expressly agreed and stipulated between the parties to this contract, that upon mutual agreement it may be changed, altered, modified, or abrogated in whole or in part, but no such change, alteration, modification, or abrogation shall be interpreted as entitling the contractors to increased rate of compensation over the rates herein specified.

ART. XIX. It is expressly understood that no member of Congress, officer, or agent, or employee of the Government shall be admitted to any share or part in this contract or agreement, or derive any benefit to arise therefrom.

ART. XX. This contract is subject to the approval of the commanding officer of the Department of the Platte, and the commanding officer of the Military Division of the Missouri.

In witness whereof the undersigned have hereunto placed their

hands and seals, at Omaha, Nebraska, the day and date first above written.

(Signed) WM. MYERS, [SEAL.]
Brev't Brig. Gen'l and A. Q. M. U. S. A.
(Signed) SAMUAL BLACK. [SEAL.]
(Signed) RICHARD KITCHEN. [SEAL.]
(Signed) WILLIAM A. MARTIN. [SEAL.]

TABULAR STATEMENT.

Schedule of prices per one hundred (100) pounds per one hundred miles (100) to be paid Black, Kitchen & Martin, contractors for the transportation of military stores and supplies, under an agreement between Brevet Brig. Gen'l Wm. Myers, A. Q., U. S. A., acting on behalf of the U. S., and the said Black, Kitchen & Martin, dated Omaha, Nebraska, 19th March, 1868.

Schedule of prices.

Points of starting.	Periods of starting.										
	1868									1869.	
From and to points and places named in article 1 of above agreement.	Aprl.	May.	June.	July.	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.
	$1 90	$1 75	$1 60	$1 60	$1 75	$1 75	$1 90	$2 00	$2 50	$2 50	$3 00

WILLIAM MYERS, [SEAL.]
Brev't Brig. Genl. A. Q. M., U. S. A.
SAMUEL BLACK. [SEAL.]
RICHARD KITCHEN. [SEAL.]
WILLIAM A. MARTIN. [SEAL.]

9 In the United States Court of Claims, December term, A. D. 1871.

BLACK, KITCHEN, AND MARTIN
vs.
THE UNITED STATES. } No. 6425.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein, and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of fifty-five thousand five hundred and thirty dollars, the said defendants say that they are not indebted to the said claimants in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

WM. McMICHAEL,
Assistant Attorney-General.

Filed May 25, 1872.

10 In the Court of Claims.

SAMUEL BLACK, RICHARD KITCHEN, AND William A. Martin
vs.
THE UNITED STATES. } No. 6425.

At a Court of Claims held at the Capitol, in the city of Washington, the 25th day of January, A. D. 1875, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimants' petition be dismissed.

By the court.

11 United States Court of Claims, December term, 1874.

BLACK, KITCHEN, AND MARTIN
vs.
THE UNITED STATES. } No. 6425.

Now come the said claimants, by their solicitor, Harvey Spalding, and move the court for an allowance of an appeal to the Supreme Court of the United States from the judgment of the Court of Claims dismissing the petition in said cause.

HARVEY SPALDING,
Claimants' Solicitor.

Filed Jan'y 26, 1875.

Ordered that the aforesaid application for an appeal be allowed as prayed for.

By the court.

JANUARY 26, 1875.

12 Court of Claims.

SAMUEL BLACK, RICHARD KITCHEN, AND William A. Martin
vs.
THE UNITED STATES. } No. 6425.

Findings of fact and conclusion of law.

This case having been heard before the Chief-Justice and judges of the Court of Claims, at the city of Washington, on the 7th day of December, 1874, the court, after due deliberation upon the proofs and evidence given at the trial, does hereby, at the time of rendering judgment, find the following facts:

First. On the 19th of March, A. D. 1868, the claimants and Gen. William Myers, chief quartermaster for the Department of the Platte, entered into a written contract for the transportation of military stores and supplies, within contract-route No. 1, as therein fully set forth; which contract is annexed to and forms part of the petition.

13 Second. At Omaha, on the 30th of April, the 1st and the 2nd of May, respectively, A. D. 1868, said Myers made a formal requisition upon the claimants, by letters addressed to them both at Omaha

and Cheyenne, requiring them, under the provisions of article 4 of their contract, to receive within fifteen days from date, (of each of said requitions,) at Fort Phil Kearney, Dakota, three hundred thousand pounds of miscellaneous stores for transportation to Fort D. A. Russell, subject to such changes as might be decided upon, making in all nine hundred thousand pounds of stores to be transported under said three requisitions.

On the last-named day, May 2, 1868, Gen. Myers notified the claimants that the destination of all said stores so to be transported from Fort Phil. Kearney was the new posts on Wind River, which destination was subsequently changed at or near the time of shipment to Fort Steele.

Fort Phil Kearney and Fort Steele, as well as Fort Russell, were within the district of contract-route No. 1, as described in said contract, and within which transportation was to be performed.

14 On the 23rd of July, A. D. 1868, Gen. Myers made another formal requisition on said contractors by letters addressed to them in like manner, both at Omaha and Cheyenne, requiring them, under the provisions of article 4 of their contract, to receive, within fifteen days from the date thereof, at Fort Phil Kearney, two hundred thousand pounds miscellaneous stores, for transportation to Fort Steele, subject to such changes as might be determined upon.

Third. At the dates of the several requisitions aforesaid the claimants had no teams at Fort Phil Kearney, and no teams could be procured there. The claimants, before performing any of the service required by said requisitions, protested to Gen. Myers and Gen. Auger against performing the service under the contract, claiming that they were not required to perform it by the terms thereof. But Gen. Myers and Gen. Auger both insisted upon the terms of the contract covering the service.

The claimants again made the same protest and claim to Gen.

15 Myers, Gen. Auger, and Gen. Wm. T. Sherman, who each insisted that the claimants were bound to perform the service under the contract. The contractors were then informed that it was necessary the work should be done, that they must notify at once whether or not they would do it, that they would be paid under the contract, and if they deemed they had any further claim, they could make it to the authorities in Washington; to which the claimants replied that they would furnish the teams that were necessary upon the requisitions, and make a claim for services beyond the contract to the authorities in Washington. And thereupon, without waiver of the respective claims on either side, the claimants undertook the service.

Fourth. Accordingly the claimants sent teams, unladen, from Fort D. A. Russell to Fort Phil Kearney sufficient to transport the nine hundred thousand pounds of stores mentioned in the requisitions of April 30, May 1, and May 2, which teams, on arriving at Fort Phil Kearney, were loaded with stores for transportation to Fort Steele, according

16 to said requisitions and said notices changing the destination to that place, and the same were duly transported by said teams.

And the claimants also sent from Fort Fetterman (within the district of said route) to Fort Phil Kearney teams, unladen, sufficient to transport the two hundred and fifty thousand pounds of stores and supplies required by the requisition of July 23rd, 1868, to be transported to Fort Steele, and the same were so transported by said teams from Fort Phil Kearney to Fort Steele.

Fifth. At the several times of receiving said stores and supplies for transportation from Fort Phil Kearney by the claimants, bills of lading were made and signed by them, specifying that the freight was to be

paid for by General William Myers at Omaha, at the contract rates. Bills were rendered, vouchers issued, and payments made for all of said transportation from said Fort Phil Kearney to Fort Steele according to said bills of lading under the contract and at contract rates. The
17 claimants have been paid in full therefor, and make no claim thereon.

But the claimants have not been paid for sending teams unladen to Fort Phil Kearney to meet the several requisitions aforesaid, and for that they claim compensation.

Sixth. The distance from Fort D. A. Russell to Fort Phil Kearney, by the ordinary travelled route, was three hundred and thirty-nine (339) miles. The distance from Fort Phil Kearney to Fort Steele was three hundred and fourteen (314) miles. The distance from Fort Steele, direct, by the ordinary travelled route, to Fort Russell, was one hundred and eighty-four (184) miles. The distance from Fort Fetterman to Fort Phil. Kearney was one hundred and sixty-nine (169) miles.

Seventh. At the contract rate, the transportation of nine hundred thousand pounds of freight (the capacity of the terms sent unladen) to Fort Phil Kearney, from Fort D. A. Russell, would have been
18 fifty-three thousand three hundred and seventy dollars; but teams travelling unladen are able to save one-fifth of the time and expense, and deducting one-fifth of said sum therefrom leaves forty-two thousand six hundred and ninety-six (42,696) dollars.

At the contract rate the transportation of two hundred and fifty thousand (250,000) pounds of freight (the capacity of the teams sent unladen from Fort Fetterman to Fort Phil Kearney) would have been six thousand seven hundred and fifty (6,750) dollars, and deducting one-fifth therefrom by reason of the teams being unladen, leaves five thousand four hundred (5,400) dollars.

By the court.

19 U. S. Court of Claims December term, 1874.

BLACK, KITCHEN & MARTIN *vs.* THE UNITED STATES. } No. 6425.

Now come the said claimants, by their solicitor, Harvey Spalding, and move the court to find specifically, the following facts in addition to those appearing in the findings of the court:

First. That on the 30th April, A. D. 1868, besides the formal requisition of the same date mentioned in the second finding of the
(Allowed.) court, Gen'l Wm. Myers also sent to the claimants at Cheyenne, from Omaha, a communication by telegraph in words and figures as follows, viz:

[Telegram.]

"OMAHA, *April* 30, 1868.

"BLACK, KITCHEN AND MARTIN,

"*Government Contractors, Route No.* 1, *Cheyenne:*

"General Auger wants two hundred (200) teams by the middle
20 of May, in readiness to go to Fort Phil Kearney. Answer what you will do.

(Signed) "WM. MYERS, *C. Q. M.*"

And besides the formal requisition on the 2nd of May, A. D. 1868, mentioned in the second finding of the court, Gen'l Wm. Myers also sent on the same day from Omaha to the claimants at Cheyenne, a communication by telegraph in the words and figures following, viz:

[Western Union Telegraph Company. From Omaha. Dated 1 May. Rec'd May 1st, 1868, p. m.]

"To BLACK AND KITCHEN.
"*Contractors, Route* 1, *Cheyenne:*

"Can't tell their destination. Have asked General Auger, and will promptly advise you.

"W. MYERS, *C. Q. M.*"

That the notice from Gen'l Myers to the claimants that the destination of all of said stores so to be transported from Fort Phil Kearney was new posts on Wind River, (as stated by the court,) was in the words and figures following, viz:

21 [Western Union Telegraph Company. From Omaha Dated 2. Recd. May 2nd, 1868—m.]

"To BLACK, KITCHEN AND MARTIN,
Transp'n Contractors, Route 1:

"The two hundred teams are to haul stores form Phil Kearney and Reno to the new posts on Wind River. Can you send twenty-five (25) or thirty (30) teams at once to Phil Kearney in addition, to haul sawmill and mowing-machines to Ft. Fetterman? You had better come down to see me.

"WM. MYERS, *C. Q. M.*"

That in addition to the fact that these posts, Fort D. A. Russell, Fort Phil Kearney, Fort Steele were located within the district of contract-route No. 1, mentioned in the second finding of the court, the fact be found that Fort Phil Kearney was a military post, established prior to the date of the contract mentioned in the first finding, and that it was located about 339 miles west of north of Fort D. A. Russell, re-
22 mote from the line of railroad, and that Fort Steele does not appear to have been located and named till about the time the teams were loaded at Fort Phil Kearney, which previously proceeded unladen to that place from Fort Russell, as mentioned in the fourth finding of the court.

Second. That in addition to the fact that "at the dates of the several
Allowed. requisitions aforesaid the claimants had no teams at Fort Phil Kearney, and no teams could be procured there, as set forth in the 3rd finding of the court, the following fact be found also, viz: And the teams necessary to transport stores and supplies from Fort D. A. Russell had to be procured from points remote from D. A. Russell, and driven unladen to that place, said Fort D. A. Russell having been a point on or near the Union Pacific Railroad, then just completed to Cheyenne, which was remote from points of supply of wagon-transportation.

23 Third. That in addition to the fact set forth in the first para-
Allowed. graph of the fourth finding of the court, the following fact be also found, viz:

The service for which the Government required the teams to be sent to Fort Phil Kearney was to aid in moving said post.

Fourth. That the prevailing rate for transporttaing freight from Cheyenne in June and July, A. D. 1868, was as follows:

To points south, $1.50 pr. 100 lbs. per 100 miles. To points west along Not allowed. the line of the railroad in process of construction, $2,00 pr. 100 lbs. per 100 miles. To points north and west, in the direction of Fort Phil Kearney, $2.10 pr. 100 lbs. pr. 100 miles.

HARVEY SPALDING,
Solicitor for Claimants.

24 United States Court of Claims.

SAMUEL BLACK ET ALS.
vs.
THE UNITED STATES.

The claimants having filed four requests for additional findings of facts, the court has considered the same, and allows the first, second, and third, and refuses the fourth in the form therein set forth.

Instead of said fourth request, the court finds that the prevailing rates of transportation from Cheyenne and other places within the district of the route covered by the contract were from one dollar and forty cents to two dollars and fifty cents per hundred pounds per mile'.

Upon the foregoing facts, the court being equally divided in opinion as to the right of the claimant to recover, one of the judges who considers them entitled to recover concurs with those holding the adverse view in ordering that pro forma, for the purposes of an appeal, the
25 petition be dismissed.

By the court.

(The court delivered no opinion in this case.)

26 In the Court of Claims.

SAMUEL BLACK, RICHARD KITCHEN, AND WILLIAM A. MARTIN,
vs.
THE UNITED STATES.
No. 6425.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitor for the claimants for the allowance of an appeal, as filed in the clerk's office January 26, 1875, and of the order of the court, January 26, 1875, allowing the same; of the finding of facts by the court; of the request for additional findings by claimants' counsel; of the order of the court thereon, and of the order of the court pro forma, for the purposes of an appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this tenth day of February, A. D. 1875.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 496. Samnel Black, Richard Kitchen, and William A. Martin, appellants, vs. The United States. Court of Claims. Filed 25th February, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

No. 496.

BLACK et al., Appellants,

vs.

THE UNITED STATES.

Brief for the Appellants.

C. F. PECK,

Attorney for Appellants.

Printed by W. H. Moore, 511 Eleventh street.

1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

No. 496.

BLACK ET AL., *Appellants*,

vs.

THE UNITED STATES.

Brief for Appellants.

The claimants brought suit in the Court of Claims for the value of the service of transportation teams of carrying capacity of 900,000 pounds, which, under orders of competent agents of the United States, marched from Fort D. A. Russell to Fort Phil. Kearny, a distance of 339 miles, and for service of other teams of a carrying capacity of 250,000 pounds, which marched from Fort Fetterman to Fort Phil. Kearny, under like authority, a distance of 169 miles. Upon trial, the court was divided in opinion as to the claimants' right to recover, and for purposes of an appeal to this court the petition was dismissed, *pro forma*.

The contract, out of which the transaction arose, is in the Record, pages 2 to 7; and the provisions thereof applicable to this claim are the following:

ARTICLE I. That the said Black, Kitchen & Martin, shall receive at any time, in any of the months from April 1st, 1868, to March 31st, 1869, inclusive, from the officers or agents of the Q. M. Department at *Fort D. A. Russell*, in the Territory of Dakota, or *such point as may be determined upon during the year on the Omaha Branch of the*

Union P. R. R., west of *Fort D. A. Russell*, or at *Fort Laramie, Dakota Territory*, all such military stores and supplies as may be offered or turned over to them for transportation by the officer or agent of the Q. M. Department, at any or all of the above points or places, and transport the same with dispatch, and deliver them to the officer or agent of the Q. M. Department on duty or designated to receive them at any of the posts or depots that are now or may be established in the State of Nebraska, west of longitude 102 degrees, in the Territory of Montana, south of latitude 47 degress, in the Territory of Dakota, west of longitude 104 degrees, in the Territory of Idaho, east of longitude 114 degrees, and in the Territories of Utah and Colorado, north of latitude 40 degrees, including if necessary, Denver City, or at any other points or posts on the route. (Record, pages 2 and 3.)

ART. II. That the said Black, Kitchen & Martin agree to transport under this agreement, from the post, depots or stations named in article 1, or from and to any other post, depots or stations that may be established within the district described in said article, any number of pounds of military stores and supplies from and between one hundred thousand pounds and twenty-five millions of pounds in the aggregate. (Record, page 3.)

ART. III. And for all stores to be forwarded from Fort D. A. Russell, or from any other points of departure on the Union Pacific R. R.., notice shall be given the said Black, Kitchen & Martin at said place of business or agency at Omaha City or Cheyenne. (Record, page 3.)

ART. IV. For and in consideration of the faithful performance of the stipulations of this agreement, the said Black, Kitchen & Martin shall be paid at the office of the Quartermaster's Department at Omaha, Nebraska, in the legal currency of the United States, according to the distance supplies are transported, and agreeably to the rates specified in the tabular statement hereto annexed, signed by the parties to this agreement. (Record, page 6.)

TABULAR STATEMENT.

Schedule of prices per one hundred (100) pounds per one hundred miles (100) to be paid Black, Kitchen & Martin, contractors for the transportation of military stores and supplies, under an agreement between Brrvet Brig. Gen'l Wm. Myers, A. Q., U. S. A., acting on behalf of

the U. S., and the said Black, Kitchen & Martin, dated Omaha, Nebraska, 19th March, 1868.

SCHEDULE OF PRICES.

Points of starting.	Periods of Starting.										
	1868.									1869.	
From and to points and places named in article 1 of above agreement.	April.	May.	June.	July.	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.
	$1.90	$1.75	$1.60	$1.60	$1.75	$1.75	$1.90	$2.00	$2.50	$2.50	$3.00

(Record, page 2.)

This contract was made on the 19th day of March, 1868.

On the 30th April, 1868, the following telegram was sent to the claimants.

"OMAHA, *April* 30, 1868.

BLACK, KITCHEN & MARTIN,

Government Contractors, Route 1, Cheyenne.

General Augur wants two hundred (200) teams by middle of May, in readiness, to go to Fort Phil. Kearny. Answer what you will do.

WM. MYERS, *C. Q. M.*"

(Record, page 10.)

Next day the following was sent:

"From Omaha, dated May 1. Rec'd May 1st.

To BLACK & KITCHEN,

Contractors, Route 1, Cheyenne.

Can't tell their destination. Have asked Gen. Augur, and will promptly advise you.

W. MYERS, *C. Q. M.*"

(Record, page 11.)

Next day the following was sent:

"From Omaha, dated 2. Rec'd May 2d.

To BLACK, KITCHEN & MARTIN,

Transportation Contractors, Route 1.

The two hundred teams are to haul stores from Phil. Kearny and Reno, to the new posts on Wind River. * * You had better come down and see me." (Record, page 11.)

At the same time the foregoing communications were addressed to the claimants formal requisitions for reception and transportation of 900,000 pounds stores from Fort Phil. Kearny, were addressed to them, and interviews in regard to the same matter were had by the claimants with Generals Myers, Augur and Sherman, in which claimants protested against performing said service, claiming they were not required to perform it under the contract. Generals Myers and Augur both insisted, and afterwards Genl. Sherman with them, that the claimants were bound to perform the service under the contract. (Record, page 9.) They insisted upon an answer from the claimants, telling them "that they would be paid under the contract; and if they deemed they had any further claim they could make it to the authorities at Washington." (Record, page 9.) The claimants' reply was as follows: "They would furnish the teams that were necessary upon the requisitions and make a claim for services beyond the contract to the authorities in Washington." (Record, page 9.)

With this assertion and reservation of the claimants' rights teams unladen of a carrying capacity of 900,000 pounds were sent from Fort D. A. Russell to Fort Phil Kearny, a distance of 339 miles, and teams unladen of a carrying capacity of 250,000 pounds were also sent from Fort Fetterman to Fort Phil. Kearny, a distance of 169 miles, and for this no payment has been made.

The claimants' petition asking therefor was dismissed by the Court of Claims for the purpose of an appeal.

ASSIGNMENT OF ERROR.

The Court of Claims erred in refusing to adjudge the claimants entitled to recover the value of the service ac-

cording to the seventh finding of facts, to wit, $48,096, and in dismissing the petition.

ARGUMENT.

The claimants ask compensation for service of teams which they had collected at great expense from remote points in order to transport supplies from Fort D.A. Russell, a point of departure specified in article I, and which they were ordered to send unladen, thence to Fort Phil. Kearny, a post established at the time the contract was made, and for other teams sent unladen to the same place from Fort Fetterman, (to which place they had previously carried goods,) the purpose of the Government being to secure aid in moving said post.

This claim is disputed by the government upon the ground that claimants were bound by the contract to receive the stores at Fort Phil. Kearny for transportation, or in other words it is claimed that the government had a right, without the consent of claimants, to constitute Fort Phil. Kearny a point of departure for the claimants' teams, or that by the terms of the contract, notwithstanding the minute specification of places of departure in article I, all points within the district were points of departure. This theory assumes that the claimants, after collecting their teams at Fort D. A. Russell for service thence might at the will of the government agents be compelled to send them without compensation into the remotest borders of the wilderness, perhaps to transport goods a few miles thereafter under pay, as compensation for a march of a thousand miles without pay.

In the view taken by the Government of this contract, which view constitutes the defence, the minute specifications of points of departure in Art. 1 accomplished no limit to the obligations of the contractors to the places named or to the base of departure specified, (the railroad west of Russell,) as points of starting; on the contrary, it is assumed he was bound to start, if called upon so to do, from

every conceivable point within the vast wilderness lying beyond Russell as far west as the 114th degree of longitude and as far north as the 47th degree north latitude.

This theory presents a marked contrast to the theory of the Government as to the meaning of similar provisions in Caldwell's contract. The Government seeks in this case to avoid payment for services rendered. In the case of Caldwell, they sought to avoid payment of damages for procuring transportation through others than the claimant of a large amount of supplies from the Missouri river to posts within the district of the contract.

Caldwell (19 Wallace, 264) sued on a similar transportation contract.

The base of starting in his case was described as follows:

"That said Alexander Caldwell shall receive * * at Forts Leavenworth and Riley in Kansas, * * and at any points or places at which posts or depots shall be established during the continuance of this contract, on the west bank of the Missouri river north of Fort Leavenworth and south of latitude 42 degrees north. (Art. 1, Caldwell contract.)

"And for the stores to be forwarded from Forts Leavenworth and Riley or from any other points of departure on or near the Missouri river, notice shall be given," &c. (Art. III, Caldwell contract.)

After the contract was made the Government collected about 4,000,000 pounds supplies at Omaha, on the Missouri river, north of Fort Leavenworth and south of latitude of 42 degrees north, and refusing to give them to Caldwell for transportation, who was prepared to transport them at a profit of about 20 per cent., procured them transported at a cheaper rate to Columbus, Lone Tree and Kearney stations, and still refusing to give them to Caldwell for transportation, gave them to another, who transported them, and delivered the same to the posts within Caldwell's contract district.

Caldwell's contract provided that he should "transport

all the military stores and supplies for which the Quartermaster's Department may require wagon transportation by contract on the route specified," provided the weight of the same shall not exceed 10,000,000 pounds, and he brought suit for damages, alleging a breach of the contract on the part of the Government.

As will be observed, the Missouri river before the construction of the railroads west thereof was the natural base of supply of all the military posts in that direction on the west slope of the Rocky mountains; but this base of supply was not literally confined to the west bank of the river, for the country lying to the west, as far as 150 to 200 miles, *produced* supplies. But as soon as the railroad was constructed west, beyond this producing district, the base of supply was transferred to the railroad, which, owing to the changed condition of the country, became literally and exclusively the base of supply of the posts beyond. If the railroad in the time of the Caldwell contract had been so far constructed that it could have been relied on as a base of supply, the Missouri river would have been left out of the specification as a base of starting. After the contract was made, however, it was completed so that it could be used for some distance; and this affording cheaper transportation the Government determined to avail itself of it. Caldwell, as soon as this determination was made, offered to transport the supplies from the railroad at the terminus of rail transportation, but this was refused, and the anomaly was presented of two contracts for the same purpose, that is, to transport supplies from a common base (the Missouri river) to posts in the district west. Caldwell asserted that if he had a right to transport any stores he had a right to transport all within the limits specified, for if the Government had a right to ship the supplies from any place not technically within the specification of starting points, this right extended to all as much as it did to a part. He affirmed that under a proper construction of the provisions for starting points, the government was

bound equally with himself, for the government having to procure transportation of supplies, themselves elected as to what places and localities the same should be started from, and the agreement in regard to them bound the claimant to make ready by the collection of his teams at the places and base specified, and it also bound the government to deliver the same for transportation at starting points specified. But the theory of the government in defending against Caldwell proceeded upon the assumption of the perfect freedom and right of the government, after making this contract, to send any or all of the supplies from any points or places not technically within the specifications of starting points. This assumption obviously involved the assertion of the right to send every pound of supplies by other contracts than Caldwell's. Caldwell's views of his contract failed altogether before this court, and those of the government prevailed.

The language of the court, affirming the technical meaning of the words "post," "depot," and "station," employed in these contracts, is as follows:

"The term 'post' in this instrument, means a military establishment, where a body of troops is permanently fixed; 'station' means a place or department where a military duty is to be discharged, or the synonym of 'depot,' a place where military stores or supplies are kept or troops assembled." (19 Wallace, page 268.)

On the whole case the language is this: "The whole matter results in this: The government is responsible in damages if it has sent its supplies through other parties than the claimant, from the posts of Leavenworth, Riley, Kearny, Sedgwick, or Laramie, or from other stations or posts thereafter established on the west bank of the Missouri river. The points from which it is proved to have sent supplies by other means than through the claimants, are not among those named, nor are they military posts, nor are they on the west bank of the Missouri river. Omaha is not among the posts named, nor is it one established

after the making of the contract. Hence there has been no breach of the contract." (19 Wallace, 270.)

In the time of the Black, Kitchen & Martin contract, the railroad at D. A. Russell and west thereof, had become the sole base of supply for the posts beyond. There was only one post on it west of Russell, which was a "military establishment, where a body of troops was permanently fixed." This was Fort Saunders, and it was not named as a place of starting. Cheyenne was a depot near Russell, on the railroad, and none of the depots between Cheyenne and Saunders were places "where military stores or supplies were kept or troops assembled." Therefore, according to the Caldwell decision, every place upon or near the railroad, at and west of Fort D. A. Russell, excepting alone Fort D. A. Russell, were excluded from the specifications of points of departure, and the government was at full liberty, and it involved no breach of the contract, to send all the supplies needed at all posts from every place on the railroad, save and except Fort D. A. Russell.

Means of transportation collects for employment on rivers and railroads from which points beyond are to be supplied. In Caldwell's case this was true, and Genl. Myers, as was shown in the Court of Claims, telegraphed the Quartermaster General as an inducement to take the transportation from Caldwell and give it to another, that $60,000 could be saved by the operation. Suppose, in like manner, a superabundance of transportation had collected at Cheyenne, affording to the government an opportunity to save a like sum by making a new contract, can anybody doubt, under the precedents, that it would have been done?

The goods would have been loaded at Cheyenne, a railroad station, not "a place where a military duty is to be discharged," two miles from Fort D. A. Russell. This would have been no breach of the contract on the part of the government. True, the claimants believing that they were entitled to the transportation from the railroad to the exclusion of other contractors, would have brought suit

as Caldwell did. It is perhaps to be regretted that the Caldwell transaction did not happen under the claimants' contract, instead of two years prior, for then there would have been presented on the part of the government to this Court, two diverse and somewhat antagonistic views as to the construction of the same provisions of the contract. On the one hand they would have claimed in effect and successfully as in Caldwell's case, that the purpose the parties had in specifying points of departure was to give the right to the government to procure through another transportation for all the stores, it only being necessary to start them from some place not within the specifications when technically considered. On the other hand, it having become necessary to move a post on the extreme border of the district where there were no teams and where none could be procured, (third finding of the court, page 9.) it would have been maintained by way of avoidence of payment for service from the point named as a point of departure, that the purpose the parties had in specifying points of departure was to make every conceivable place in the remotest bounds of the wilderness points of starting, at the will and pleasure of the government.

The Caldwell contract bound the contractor to transport from starting points widely separated upon summary notice millions of pounds of supplies. The maximum amount specified would load 2,000 teams of ten oxen each. The maximum specified in this contract would load 5,000 teams of ten oxen each, and these teams had to be collected at Fort D. A. Russell from remote points of supply. (Record, page 11.)

In case of default it was provided that the Government should "have power to supply the deficiency either by purchase, hire or special contract," at the expense of the claimants. (Contract, Art. xiii.) Thus the entire fortunes of the contractors and their backers were staked in these contracts. What were the reciprocal obligations? The Government, without any breach of the contract, could

procure all the goods transported by others if the price of transportation declined, and could compel the claimants to transport the whole if the price advanced. Even after notice and special acceptance thereof by the claimants the Government could withhold the transportation without any breach of the contract. (Bulkley's case, 19 Wallace, 37.) The court made the following declaration in that case:

"If, the day after the transportation commenced, the wagons had been ordered back to the place of departure, unloaded and the transportation abandoned, there would have been no breach of the contract. * * * It commits the Government to nothing but to pay for services rendered." (19 Wallace, 40.)

And yet we find the Government resisting this claim for payment for services which it commanded to be rendered under the contract while it was under no obligation to do so, upon a forced construction of the specification of points of departure, no warrant for which can be found in the words of the contract or the circumstances under which it was made, but which, on the contrary, is in conflict with the expressed provisions, and its fair implications, the circumstances under which it was made, and with the decision of this court of the Caldwell case.

We therefore ask for a reversal of the judgment of the Court of Claims, with directions to enter a judgment in favor of claimants for the value of the services rendered in accordance with the seventh finding of facts by the Court of Claims, to wit: $48,096.

REPLY TO APPELLEES POINTS.

In all contracts for transportation of military stores on the plains and in the territories, an agreement as to starting points is indispensable, and is in fact the very foundation upon which they rest. All the expenditures incurred to collect teams at the starting points agreed upon is so much advanced by the contractors on the faith of the gov-

ernment, pledged to furnish service and compensation from thence. The collection of teams from other points goes on continually through the whole time of the contract. The first supply of teams is drawn from the markets on and contiguous to the Missouri river. After that the collection may in part be derived from teams once employed returning from points to which they have transported goods. The profit of the first trip compensates for the first outlay of collecting teams from distant places, and the profit of the second trip compensates for the expenses as well of returning the teams. The employment of teams throughout the year from starting points specified therefore, involves the necessity on the part of the contrctors to return a large part of the teams employed from points of delivery of cargoes to the "original points of departure." It sometimes happened that the government desired to send back from points of destination superfluous material to some intermediate point or to the original point of departure, and it was sometimes necessary to have returning teams stop at some intermediate point and take on something and leave the same at another intermediate point. This class of transportation was however very small, while the teams employed by the contractor were ordinarily in trains of twenty-five wagons, carrying 125,000 pounds or more, (Art. VI, Record page 4.) It was therefore against the interest of the contractors to delay these trains for this service, although it might be of considerable importance to the government. In order to secure its performance, Art. XIV, was incorporated in this contract. It is substantially the same as in the Caldwell and other similar contracts. Some dispute probably arose before this contract as to whether the contractor was bound to stop his trains at intermediate posts to load a small quantity of goods, and to make this clear, the specification, "or from one point to another within the route" was added to the single sentence which constitutes Art. XIV in this contract. The whole sentence and article by express lim-

itation is about goods "to be transported back." This is all the transportation it provides for, and it is of a sort not included in Art. I, and would be excluded from the contract were it not for this Article.

The government has laid hold, not upon the whole of this Article, as it appears, but upon the expression in it above quoted as the sole contract support of their theory, that every place in all this wilderness was a point of departure for claimants' teams. This construction is made to sweep away not only all the limitations of Article I, upon which the whole contract rests, but also all of the limitations of the remaining portion of Art. XIV, and is therefore as repugnant to law as it is inconsistent with and irreconcilable with the various provisions of the contract.

It may or may not have been true that the government, when this contract was made, intended that the contractors should assist in moving the stores from Phil. Kearny. If such was the intention, it was the purpose to have it done in accordance with the terms of the contract. This required compensation to be made from the starting point agreed upon, and if the government required the teams to go without loads this concerns the government, but does not destroy the right of the contractors to compensation. Nothing can be clearer than this: If the parties had intended that the contractors should send teams to Fort Phil. Kearny, 339 miles beyond Fort D. A. Russell, at their own expense and without compensation, after bringing them some hundreds of miles to Fort D. A. Russell, Fort Phil. Kearny would have been *named* as a point of departure.

If it be considered that this service was under the contract or service supplemental thereto, the contract, so far as it can be traced, is the measure of the value thereof. It is a fair implication from the agreement to pay for loaded teams employed a specified rate, to pay for teams unladen the same rate, less the difference in time and expense.

If it be considered that the service was outside the con-

tract altogether, the fact that there was no expressed contract, either written or verbal, in no manner discharges the government from the obligation to pay therefor, as is urged by the Assistant Attorney General. On the contrary, the government having required the service to be performed, and it having been performed, a contract to make reasonable compensation is implied; and the contract proven is good evidence as to the fair and reasonable value thereof, no other evidence being offered by the defence.

If it could be made to appear on technical grounds that this service was required and rendered outside the contract so that its value could not be measured by it, then it would follow that payment for the service of the teams employed would be due from the places on the Missouri and Arkansas rivers, from whence they were brought, instead of from D. A. Russell, as claimed. This would entitle the claimants to an increased judgment.

The government having commanded the services to be performed under the contract, the least that can be accorded the claimants is to pay them on the basis of the contract from the starting point specified in it.

C. F. PECK,
Attorney for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

SAMUEL BLACK ET ALS., APPELLANTS,
vs.
THE UNITED STATES.
} No. 496.

APPEAL FROM THE COURT OF CLAIMS.—SUBMITTED UNDER RULE XX.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

SAMUEL BLACK ET ALS., APPELLANTS,
vs.
THE UNITED STATES. } No. 496.

APPEAL FROM THE COURT OF CLAIMS.—SUBMITTED UNDER RULE XX.

Brief for the United States.

The sole question presented is the construction of a contract. (Record, 2–7.)

It is apparent that the territory through which supplies had to be transported by teams was divided geographically into routes, of which the one named in this contract was numbered ONE. (See first and second findings of fact, Record, 8, 9.)

The service for which the United States agreed to pay, at the rates specified, was *the carriage of goods* within the territorial limits mentioned in article 1 of this contract. (Record, 2, 3.)

For all goods so carried it has paid the stipulated price. But a claim is here made for the travel of the

empty teams to the place of loading. The legality or justice of this the United States deny.

This claim is based (as it only can be) upon the assumption that there were designated places where alone the contractors could rightly be required to receive the articles to be transported; indeed, the appellants' counsel confines it to a single point, viz, Fort D. A. Russell. Is this correct?

By the first article of the contract, (Record. 2,) Black, Kitchen & Martin were to receive "at Fort D. A. Russell, or at such point as may be determined upon during the year on the Omaha branch of the Union Pacific Railroad west of Fort Russell, or at Fort Laramie," all supplies turned over to them by the Federal officers or agents at either of those points for transportation, to be carried to any of the posts or depots that now are, or may hereafter be, established within the geographical limits mentioned, agreeably to the instructions from the forwarding agent at Fort Russell "or other place of departure."

If this language was all that is to be found in the contract applicable to the places of loading, it might plausibly be argued that the one point on the railroad designated within the year, with Forts Russell and Laramie, would constitute the sole points of departure. But the whole contract is to be taken together, and this language is not, by any means, all that is to be considered in ascertaining the meaning of the parties on this branch of their agreement. At the close of that same article 1, (Record, 3,) is a stipulation that the services shall be compensated in the manner hereinafter provided by article xviii; that is, by the mileage *goods*

were hauled, and not by the distance traversed by the teams.

By article ii they agree to transport goods "*from* and to any other points, depots, or stations *that may be established* within the district described." (Record, 3.)

By article iv they are to have the reasonable notice there specified (Record, 3) of the "point the stores will be ready for delivery to them, and the place of their destination, subject to such changes as may be decided upon while *in transitu*," &c. This phraseology utterly refutes the idea that Fort Russell, or any other single spot, was understood to be the one point at which alone teams were to be laden. So does article vi, where it requires the goods to be delivered "in the same lots or invoices as received at *points* of departure." (Record, 4.)

Article xi (Record, 5) explicitly declares "that the said Black, Kitchen & Martin shall transport *all* the military stores and supplies for which the Quartermaster's Department may require wagon-transportation by contract, on the route specified by this agreement, (*i. e.*, route No. 1,) during the year ending March 31, 1869," not exceeding twenty-five million pounds, and excepting such as the Government might choose to transport by its own means.

Article xiii (Record, 6) provides what shall be done in case the contractors fail to transport in accordance with their agreement, viz, that the Government officers would procure the work done by others, and charge Black, Kitchen & Martin with the extra expense.

We quote the whole of article xiv, as found upon page six of the record, as entirely decisive of this controversy:

"ART. XIV. It is understood that if, at any time,

stores or supplies are required to be transported back to any point on the road, or to any of the original points of departure, *or from one point to another within the route,* they shall be carried upon *the same terms* and conditions as herein provided," (Record, 6.) These terms, so far as they relate to the agreed compensation, are found in article xvii, upon the same page of the record; according to which the contractors were to be paid, at the place named, "in the legal currency of the United States, *according to the distance supplies are transported,*" and agreeably to the rates specified.

Were it not for the fact of the Court of Claims being equally divided upon this case, and the uncertainty always to be felt about the success of an endeavor correctly to determine the construction of language with reference to which the parties originally using it entirely disagree, and the impossibility of any man conjecturing just how a matter (perfectly plain to him) will strike another's mind, we feel that we might safely leave the subject here; but, as it is, we deem it a duty to trespass a little upon the patience of the court in discussing it further, and more in detail; though in doing so we shall only apply to it elementary principles of law.

"Contracts are always to be constrned with a view to the real intention of the parties."—(U. S. *v.* Gurney, 4 Cranch, 343.) It is not designed to cite cases or authorities to support such a fundamental principle of the interpretation of contracts, but a few instances may be referred to in order to show the manner and extent of its application. So, in the case just mentioned, (4 Cranch, 343,) this court said: "In this contract the object of the United States was to remit to their bankers

in Amsterdam a sum of money for which they had occasion in Europe;" and its language was interpreted with reference to the purpose indicated. Therefore, where a debtor agreed to secure his creditors by a mortgage of "his real estate in West Roxbury and the dwelling-house thereon," it was held that this required a conveyance of *all* his realty in that town, and that one of the lot, upon which his dwelling stood, was not a compliance with the terms; because the general object of securing the creditors could only be accomplished by a mortgage of all his estate there. (Rankin *v.* Wood, 12 Gray, 34.)

So, where a bondholder agreed to bear his proportion of the expenses of carrying out the organization of a new company to take possession of the mortgaged property, printing, &c., he was held bound to contribute toward the legal expenses as well as the printing, since the general purpose was the organization of a new corporation. (Catawissa Railroad Company *v.* Titus, 49 Penn., 277.)

So, a physician bound to attend, for a stipulated sum, the inmates of a county infirmary was held to be liable to be called to those removed to buildings adjoining the infirmary existing at the time of the contract; because the purpose was the care of the health of the poor dependent upon the public. (Johnson *v.* Santa Clara County, 28 California, 545; Preble *v.* Bangor, 64 Maine, 115.)

As Judge Story expressed it in Cleveland *v.* Smith, (2 Story, 287,) "The general intention is to be carried into effect as the predominant intention."

The general, predominant intention in the case at bar was to provide for all needed transportation within

stated geographical limits for the then ensuing year. (McKie *v.* New Orleans, 16 La. Ann., 79; Springsteen *v* Sanson, 32 N. Y., 703; Salmon Falls, &c., *v.* Portsmouth, &c., 46 N. H., 249; Rose *v.* Roberts, 9 Minn., 122; Karmuller *v.* Krota, 18 Iowa, 352.)

This intention is to be gathered of course from the whole instrument, and not from isolated passages, (White *v.* Booker, 4 Metcalfe, Ky., 268; Warren *v.* Merrifield, 8 Metcalf, Mass., 96; Barton *v.* Fitzgerald, 15 East, 541,) and is to be the intent there expressed; not what they *would* have expressed had subsequent events then been foreseen, (Farmers' Company *v.* Commercial Bank, 15 Wisc., 438; Rogers *v.* Broadnax, 27 Texas, 240; Sanson *v.* Bell, 2 Campb., 39; Gether *v.* Capper, 80 Com. Law, 704.) In this last case, which is examined and assented to, and distinguished in Barreda *v.* Silsbee, 21 Howard, 161, Mr. Justice Maule speaks of "the *golden rule*, * * * that the grammatical sense of the words must be adhered to, unless such a construction would be contrary to the intention of the parties, or would involve some absurdity, repugnance, or inconsistency." (Clay *v.* Bullard, 9 Robinson, 308; Commercial Bank *v.* New Orleans, 17 La. Ann., 198.)

The whole contract is to be so considered, if possible, as to *harmonize* its provisions, and not to see which was probably considered the more important. (Hibbard *v.* Hurlburt, 10 Verm., 178.)

And the same court thus lay down the rule in Clark *v.* Lillie, (39 Verm., 411:) "The law will presume the defendant meant what his language, by its terms and under the circumstances under which it was used, would fairly be understood to mean; and this presumption is a matter of law, *and not to be rebutted by proof that he*

meant something more or different, which he made no attempt to express, and which the plaintiff neither understood nor had reason to understand."

And in McIntyre *v.* Belcher, (14 J. Scott, N. S., Com. B. Rep., 664,) Williams, J., remarked: "In cases of this sort, the court should be cautious not to infringe *the golden rule* that contracts are not to be construed by what one feels would be right, but by *what is expressed* in, or is necessarily to be implied from, the language of the parties."

The language employed is to be construed most strongly against the party using it; here, against the contractor, who promises performance; or, as Judge Metcalf expresses it, in his work on contracts, p. 312, "The party promising must do so much as will make the terms of his engagement operative."

What were the present claimants required to do to make these terms of their engagement operative, viz, "if at any time stores or supplies are required to be transported * * * from one point to another within the route, they shall be carrried upon the same terms and conditions as herein provided?" [Record, 6, art. xiv.]

REPLY TO SPECIAL POINTS OF APPELLANT'S ARGUMENT.

The claimants say, upon the fifth page of their brief, that the theory of the Government "assumes that the claimants, *after collecting their teams at Fort Russell for service thence*, might, at the will of the Government agents, be compelled to send them without compensation into the remotest borders of the wilderness, perhaps to transport goods a few miles," &c., &c. No such position is

taken by the United States. The business offices of Black, Kitchen & Martin were at Omaha and Cheyenne, places separated by more than the entire width of Nebraska. At these post-offices they were to be notified where teams were to be furnished. If notified that they were wanted at Fort D. A. Russell they would be entitled to compensation if, when they reached that post, no loads were provided; just as a vessel hired to carry coals from Philadelphia to Boston could recover if, on reaching Philadelphia, no cargo was there to be put on board. (Buckley *v.* U. S., 19 Wallace, 37.) At the bottom of page 5 and top of the following page (and again upon the tenth page) the expression above quoted is repeated: "It is assumed he was bound to start, if called upon to do so, from *every conceivable point within the vast wilderness*," &c., &c. As a rhetorical flourish this is very good; but as an argument it is palpably absurd; for the *subject* of this contract was the transportation of supplies, and these old contractors knew perfectly well that it was because "the vast wilderness" did not furnish them that transportation was required at all. Those points to and from which teams would *probably* be sent were approximately known, or thought to be known, to both parties when they entered into their agreement. At all events, it was certain that supplies would rather have to be carted into the trackless waste than out of it. The woods were not full of them.

Into the counsel's elaborate re-argument of the Caldwell case—decided against him in 19 Wallace, 264—we do not propose to enter, but we are under obligation to him for calling attention to it, as it emphasizes the clause of article xiv, to which we have referred. Ac-

cepting for the present the counsel's statement, it appears (see top of page 10 of his brief) that the disagreement under the Caldwell contract arose two years before this one with Black, Kitchen & Martin was made; that these contractors knew that Mr. Caldwell's claim to transport all supplies within the route was resisted (successfully in the end) because his contract gave him the right to carry only those shipped from specified posts; and that the fourteenth article of his contract provided only for transportation between these posts, &c.; *therefore*, Black, Kitchen & Martin, in their contract now before the court, added (as their counsel say, at the bottom of the twelfth page of their brief) "the single sentence" to article xiv, as it stood in Caldwell's contract, "*or from one point to another within the route.*' Why was this single sentence added? *Cui bono?* Evidently, because the contractors meant to preclude the Government from doing with them as was done with Caldwell, and intended to monopolize the privilege of carrying supplies from all *points* within the routes, whether posts, depots, or not; and whether upon the line of the railroad or "from the remotest bounds of the vast wilderness." If, as counsel suggests, (page 12 of his brief,) "some dispute *probably* arose as to whether the contractor was bound to stop his trains at intermediate posts," &c., we should like to have the court examine article xiv, and say how the insertion of these words, 'or from one point to another within the route," tended to facilitate the settlement of any such hypothetical controversy! Was not the contract as clear upon this subject without this clause as with it?

But why suggest a *probable* dispute, that may be the mere figment of counsel's imagination, to account for

the use of these words, when he has just elaborately stated the precise difficulty known to have actually arisen in Caldwell's case and to have been solved only by extended litigation, and which this clause exactly meets.

If the contractors meant to compel the United States by this sentence to deliver to them all supplies that were to be transported "from one point to another within the route," shall they not properly be held to the corresponding obligation, to convey them agreeably to the terms of the contract?

This language not being the old established printed form, as Caldwell's was, (see 8 Court of Claims Rep., 340, first sentence of opinion,) but an interpolation *after* litigation, if not because of it—*post hoc*, if not *propter hoc*—should receive the weight to which the deliberation attending its use entitles it.

The contractors thought they knew where supplies would be likely to be taken from and to what point carried; but, to cover the contingencies of the future, inserted this clause; and it must be so read as to have the effect then designed by both parties.

"If a bond of indemnity recite certain matters as the subject, but also embrace in the obligation, 'any other account thereafter to subsist,' such other account will be included." (Sansom *v.* Bell, 2 Campb., 39.)

Counsel's argument extends itself over facts (if they be such) not connected with the case, and which the Court of Claims were not even asked to find; such as (on the top of the ninth page of his brief) the statement that "the railroad at D. A. Russell and west thereof had become the sole base of supply for the posts beyond,"

&c., &c. And just below the middle of this same page he assumes to tell what was proved in the Court of Claims in another case; and at the bottom of the page he states what would have been done had something happened that did not happen. In these excursions, after the unknown and the hypothetical, we do not propose to follow him, but to confine ourselves to the inquiry, whether or not the United States ever agreed to pay for the travel of the empty teams that were sent after the supplies.

If so, why confine the claim to the distance from Fort Russell to Fort Kearney? Why not charge for their travel and support from the point where first they were purchased by the contractors for the performance of this transportation? In one sense, all these expenses were expected to be covered, or compensated for, by the contract; that is, Black, Kitchen & Martin doubtless estimated them in computing the rates at which they could afford to carry these supplies. If they judged wisely, they protected themselves; if unwisely, they alone should expect to bear the consequences.

We do not see why it cannot be compared to a familiar occurrence. A gentleman sends down for a hack to take himself and family from his residence to the railroad station; he pays a *per capita* rate for the distance from his house to the depot; but, in establishing this rate, the cost of maintaining the team while idle at the stable or on the stand is estimated; but it would be a novelty indeed for the driver to claim pay specifically for bringing his empty carriage after his passengers.

In several portions of his brief, and in varying phraseology, counsel presents the idea that the Government

"required" or "commanded" the service performed, without reference to the contractors' duty to perform it. Thus upon the last page (14): "On the contrary, the Government having required the service to be performed, and it having been performed, a contract to make reasonable compensation is implied," though in the concluding paragraph of the same page he states it that "the Government having commanded the services to be performed *under the contract.*" At the bottom of the tenth page he says: "In case of default it was provided that the Government should have power to supply the deficiency, &c., at the expense of the claimants. Thus the entire fortunes of the contractors and their backers were staked in these contracts."

The facts stated show that the agents of the Government did not require anything of these parties except performance of the contract. *If* this transportation came within its terms, they were expected to perform it or suffer the legal consequences. There was no compulsion put upon them except that to which they bound themselves when they signed this contract. It was only "*in case of default*" that they were liable to expense. If they did just what their contract required, their fortunes were not staked at all, except in the sufficiency as compensation of the sum for which they agreed to do the work. From the claimant's line of argument, one would suppose "the Government" had some mysterious and irresistible power, or would exercise martial law to compel the transportation of these supplies, or the hauling of these empty teams; whereas its sole resource was just that which any man would have had who had entered into such an agreement as this is with his fellow.

As this court remarked in Scott *v.* The United States,

(12 Wallace, 444–'5,) there is no surer guide than the construction which parties put upon a contract by *their acts*. If these men really felt they were not bound to take these supplies from Fort Kearney to Fort Steele, all they had to do was to decline the service; and no compulsion was possible, no fortune staked, *if they were right* in their construction of the contract. But it was because they apprehended in their own minds that the position that they had assumed was untenable that they acquiesced in the requirement, but protested only in order to lay the foundation of the present claim so as to obtain something "extra," if they could. And upon page 13, the counsel admits that it may have been true that the Government intended that the contractors should assist in moving the stores from Fort Phil Kearney.

The War Department can only contract in writing, (R. S., § 3744.) So, this service was within the terms of this writing, or else it was not done by virtue of *any* contract with the United States, and there is no liability to pay for it. (United States *v.* Gibbons, 8 Wallace, 275.)

The contract was for *the transportation of goods* only. If the services were within it, the compensation was to be determined by the number of miles goods were hauled; if without it, no claim exists at all. How the Court of Claims could have been divided in opinion is not perceived in view of its decisions in Henderson's case, (4 Court of Claims Rep., 75, and Lindley's case, id., 359;) but doubtless the division was justified by some facts or view of the facts which the record before us does not present.

The services rendered were not demanded nor accepted by the representatives of the Government any other wise than as in fulfillment of the claimant's obligation under this contract. No new contract was made. All the officers of the United States expressly "insisted upon" the doing of the work *under this contract*, and it was done "without waiver" of that claim. (Record, p. 9, third finding.) The dispatches were all addressed to them as contractors.

No contract will be implied where there is an express one, (Simpson *v.* Bowden, 33 Maine, 551,) nor where the parties cannot legally make an express one. (33 Maine, 552.) Here they could not make an express one except in writing, according to R. S., § 3744. Nor will a contract be implied as against one who protests against such an implication during the whole transaction from which it is sought to be inferred.

The officers of the Quartermaster's Department told the contractors that they were legally bound to do the work, nor was any hope of legal redress in *the courts* ever indulged; only that "the authorities" might, if they please, give them consideration, if found equitably entitled thereto.

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